United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/s

No. 75-7358

FRANKLIN H. LITTELL,

Appellant,

v.

WILLIAM F. BUCKLEY, JR.,

Appellee

On Appeal From the
United States District Court
for the
Southern District of New York

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I

SCOPE OF APPELLATE REVIEW IN THIS CASE

In his brief, plaintiff-appellee Buckley argues at length that Rule 52(a) of the Federal Rules of Civil Procedure requires application of the "clearly erroneous" standard of review in this case. But because

the fact-finding process in a libel case is so inextricably intertwined with profound constitutional issues, the mere incantation of "not clearly erroneous" does not end the matter. Indeed, it is obvious that appellee recognizes this, for most of his brief consists of a discussion of facts, a discussion which goes far beyond that of the District Court's opinion.

Paradoxically, appellee has now all but abandoned any attempt to support the decision below on its own terms. The rewriting of the book in which the trial judge engaged pales, for example, next to the improbable discussion at pp. 10-17 of appellee's brief. Buckley would take every single reference to "fascist" and "totalitarian" (which in Littell's theoretical framework includes both fascism and communism, a point completely ignored by Buckley) and apply it to himself. Of course, there are vehement denunciations of these things on nearly every page; the very purpose of the book was to alert religious persons to a perceived threat posed by extremists to religious and political freedom. The fact is that there was no evidence that any reader of the book would or did interpret it as Buckley claims. No witness

who supported plaintiff, including Buckley himself, had even read more than the disputed passage (AI. 158-59 (Buckley); AI. 287-88 (Lowenstein); test. of Warren Steibel, 4/24/74 at jqh 5; test. of Harry Elmlar, 4/24/74 at jqh 19). [1/]

The discussion in appellee's brief of the claimed "factual errors" in Wild Tongues similarly goes far beyond the findings even of the District Court, relying, for example on claims regarding condemnation of God and Man at Yale (p. 21), and Buckley's misquotations (p. 25) which the court below held were not libelous (394 F. Supp. at 940, AII. 556).

This shift in focus away from the clear findings

1/ Aside from Littell, two other witnesses called by plaintiff had read the entire book. One was Edward Klagsbrun, a partner in Linden & Deutsch, defendant Macmillan's counsel at trial, who had read Wild Tongues for libel before publication. Klagsbrun's testimony (which was not available when appellant's original brief was filed because of an error by the court reporters) supports in considerable detail the non-libelous interpretations of the allegedly defamatory passage. Ron Henderson, who edited Wild Tongues, testified at length that he felt the book was accurate and did not make the allegedly libelous statements. Although Klagsbrun and Henderson were interested witnesses, they were never declared hostile nor is there any finding that their testimony was not entirely credible.

of the District Court is strong evidence that the decision below is unsupportable in its own terms and, indeed, clearly erroneous.

In any event, it is clear that in libel cases the First Amendment demands painstaking appellate scrutiny of all facts found at trial which have constitutional significance. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court held that where an attempt is made to regulate speech,

> the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect . . . ." We must "make an independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. Id. at 285 (citations and footnote omitted).

See also, e.g., Fiske v. Kansas, 274 U.S. 380, 385-86 (1927); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (appeal from federal court decision). Similarly, even where the First Amendment is not implicated, the Supreme Court has never considered itself bound even by state court findings of fact on "any issue essential to the decision of a claim" of a constitutional right.

If it were, constitutional principles could be "frustrated by distorted fact finding." Haynes v. Washington, 373 U.S. 503, 515-16 (1963). If these principles apply to review of state court judgments, their force is even stronger when a federal court judgment is reviewed. Not only is there no problem of state-federal comity, but the appellate tribunal may exercise its supervisory powers over the lower federal courts.

Moreover, and contrary to the implication of appellee's argument, review under the "clearly erroneous" standard when the fact-finder was a judge is considerably broader than appellate review of a jury verdict. 9 C. Wright & A. Miller, Federal Practice and Procedure §2585 at 730-31 (1971). Despite the greater deference which must be paid jury verdicts by virtue of the Seventh Amendment, the Supreme Court has not hesitated in libel cases to review the facts in detail to insure that First Amendment principles are protected. See New York Times Co. v. Sullivan, supra, particularly 376 U.S. at 285 n. 26, and subsequent cases. This court did so in Goldwater v. Ginzburg, 414 F. 2d 324 (2d Cir. 1969), cert. denied 396 U.S. 1049 (1970). And in Davis v. Schuchat, 510 F. 2d

731 (D.C. Cir. 1975), on which appellee relies heavily because it was an appeal from a defamation bench trial, Rule 52 is nowhere mentioned in the course of a lengthy review of the evidence supporting the district court's findings. Id. at 735-36. The District of Columbia Circuit engaged in the analysis despite the very simple nature of the factual dispute--whether defendant called plaintiff a "convicted felon" knowing or strongly suspecting it to be false. In this case, where the record is voluminous and the defamation claim complex, the broadest possible scope is afforded the reviewing court.

Finally, irrespective of constitutional considerations, the "clearly erroneous" doctrine applies only to pure questions of fact. Where legal inferences from facts or the application of law to fact are involved, they are not protected by the rule and are freely reviewable. 9 Wright & Miller, supra, §2589 at 753. This principle is particularly clear where a finding results from the application of an erroneous legal standard to the facts. Id., §2585 at 734. Littell's basic position, of course, is that the court

below did not properly apply the "actual malice" standard and related First Amendment principles to the facts of this case. Rule 52 is no barrier to reversal in these circumstances.

Buckley's brief displays a pervasive confusion between pure matters of fact and questions involving conclusions drawn from facts which parallels his misinterpretation of the "clearly erroneous" doctrine. Most of his brief argues not facts, but conclusions, either legal or socio-political, which arguably may follow from facts. It is not a libel brief; it is an unfavorable book review disagreeing strongly with the contents of Wild Tongues.[2/]

2/ See, e.g., Brief for Appellee at 17 ("peculiarity of selecting a fascist fellow traveler"--note that on p. 32 appellee quotes the presumably respectable criticism of Danger on the Right calling Buckley a "leading fellow traveler of the American Radical Right."); 22 (the location of the John Birch Society on the political spectrum); 26 (characterization of Buckley's attitude toward prominent liberals); 29 ("excellence" of Buckley's libel record).

II

THE PUNITIVE DAMAGE AWARD
IS UNCONSTITUTIONAL

Appellant recognizes that Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), does not expressly overrule Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) or Goldwater v. Ginzburg, supra. The significant departure in Gertz came, rather, in its explicit recognition that the only legitimate state interest served by libel laws is the protection of individual reputation. 418 U.S. at 341. The Court went on to analyze separately each type of defamation damages in order to determine whether it serves this interest. Gertz flatly held that punitive damages do not serve the state interest--they are "wholly irrelevant" to it. 418 U.S. at 350. The irrelevancy remains the same whether the standard of proof is negligence or actual malice.

The basis for this court's conclusion in Goldwater v. Ginzburg, supra, 414 F. 2d at 341, that punitive damages serve "two wholly legitimate purposes: (1) the protection of the libeled individual's reputation and (2) the protection against like abuse of all other

persons similarly situated," citing Butts, supra, 388 U.S. at 161, has thus been rejected. It is not surprising that the Supreme Court did so in Gertz, for Mr. Justice Harlan himself questioned his earlier formulation, dissenting in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62, 72 n. 3 (1971). Moreover, Mr. Justice Marshall's dissent in Rosenbloom, 403 U.S. at 78, advocates elimination of punitive damages in a discussion which was clearly the inspiration for the Gertz majority opinion. 403 U.S. at 81-87. His analysis does not depend on any distinction between standards of fault. Its key is the realization that First Amendment robust debate is ill-served by allowance of "windfall" "substantial damages without even an offer of evidence that there was actually injury" 403 U.S. at 83. That is exactly the problem here.

In Davis v. Schuchat, supra, 510 F. 2d. 736-38, heavily relied upon by Buckley, this problem was discussed, but the Court failed to recognize that Gertz simply did not decide whether punitive damages are available where actual malice is shown. The D. C. Circiut went on to uphold the constitutionality of punitive damages solely

in reliance upon the reasons advanced in Goldwater, which were taken from Butts, and which are rejected in Gertz. This was error.

The First Amendment theory which animates Gertz requires a decision that plaintiff's windfall award is unconstitutional.

III

BUCKLEY HAS NOT PROVEN ACTUAL MALICE WITH CONVINCING CLARITY

Appellee's brief is permeated with an error fatal in a libel action. Buckley repeatedly confuses the "truth," with what Littell testified he believed, thereby implying that Littell is subject to liability if what he wrote is determined to be objectively false.[3/] Times v. Sullivan prohibits such a tactic.

The evidence and testimony of Littell at trial clearly demonstrated that he believed Buckley was a fellow traveler of the far right, a libeler and a purveyor

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3/ Of course, it is Littell's primary position that under the First Amendment, truth or falsity in matters of political or religious discussion such as that involved here are not the concern of the courts.

of fascist material. Buckley's disagreement is no grounds for a libel suit. Moreover, plaintiff's witness Edward Klagsbrun testified without contradiction that during meetings prior to publication of Wild Tongues, Littell "was absolutely convinced" that the attacks upon him and the Institute for American Democracy in Buckley's publications were part of a radical right campaign against Littell and other church leaders. Test. of Edward Klagsbrun, 6/11/74, at 1hh 29-30, 32-34. Even if Littell's belief was erroneous, this is strong evidence it was sincere.

A number of other aspects of appellee's brief merit short comment. At page 30, Buckley grossly misquotes appellant's brief (and indeed misquotes his own earlier correct quotation at p. 4 n. *). Any "admission" by Littell that Buckley is not a fellow traveler of fascism is combined with the assertion that, as a result, Littell could not have intended to label Buckley such a fellow traveler.

Buckley's attempt to picture Littell as having believed that Buckley was an "honest conservative" until 1968 (Appellee's brief at 37) is very strained. While Littell never publicly accused Buckley of betraying

conservative principles, he produced substantial evidence that could lead to that conclusion, and he expressed his doubts privately to mutual friends. The letters to Buckley (quoted in Appellee's brief at 31) must be taken for no more than what they were--attempts to establish a dialogue with Buckley so that Littell could resolve his private doubts.

Even Buckley does not take his argument on malice seriously, or at least not seriously enough. It is axiomatic that proof presented to show actual malice must demonstrate liability with "convincing clarity." E.g., New York Times Co. v. Sullivan, supra, 376 U.S. at 285-86.

Yet when he discusses Littell's bad faith in his brief, even Buckley can express no more certainty than that the evidence is "tending to negative good faith," (p. 36) or "suggests that it was malice" (p. 25) activating Littell.

Finally, in support of a point made in Appellant's original brief (at 58), Littell would call the Court's attention to instances during the testimony of witnesses other than Littell when the trial judge repeatedly and

unfairly interjected himself into the questioning.[4/] See, e.g., testimony of Harry Elmlar, 4/24/74 at jqh 47-56; Test. of Ron Henderson, 4/26/74, at mbe 22-39, 49-58, 73-84, 92-103; test. of Edward Klagsbrun, 6/10/74, at lhrf 8 and 6/11/74 at lhh 41-51.

Buckley's proof of actual malice is, in the final analysis, no stronger than that of the plaintiff in Adey v. United Action for Animals, Inc., 361 F. Supp. 457 (S.D.N.Y. 1973)(Weinfeld, J.), aff'd 493 F. 2d 1397 (2d Cir. 1974). There the plaintiff's medical experiments on animals had been subjected to sharp criticism by persons other than defendants, planitiff's own writings supported defendants' charges against him, and defendants believed that any animal experimentation is immoral. Similarly here, the allegedly libelous passage is justified in Littell's mind by Buckley's own writings and the criticism of others and by Littell's firm beliefs about Buckley's political orientation and the quality of his journalism.

4/These transcripts were not available when appellant's original brief was filed.

CONCLUSION

For the reasons stated above and for those in appellant's main brief, the decision of the court below should be reversed and Buckley's complaint ordered dismissed.

Respectfully submitted,

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Certificate of Service

I, David A. Barrett, a member of the bar of this Court, hereby certify that the foregoing reply brief for appellant was served upon appellee by mailing three copies, first-class postage prepaid, to his attorney, J. Daniel Mahoney, 51 West 51st Street, New York, N.Y. 10019, on February 13, 1976.

David A. Barrett

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